Supreme Court, U.S.
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No. 01-419

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI* STATES IN SUPPORT OF PETITIONERS

CARLA J. STOVALL
Kansas Attorney General
STEPHEN R. MCALLISTER
Kansas State Solicitor
(*Counsel of Record*)
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612
(785) 296-2215

Counsel for the *Amici* States

[Additional Counsel Listed After Conclusion]

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QUESTION PRESENTED

Does 49 U.S.C. § 14501(c) of the Interstate Commerce Act permit cities to enact safety regulations regarding local tow-truck operations, as the Second Circuit and the California Court of Appeals have held, or does it preempt such regulations, as the Fifth, Sixth, Ninth and Eleventh Circuits have held?

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INTERESTS OF THE *AMICI*

The States have a substantial interest in the question presented in this case. The Sixth Circuit's decision effectively holds that the States may not delegate their general police power authority to units of local government which are, after all, subdivisions of the State.

All States delegate considerable police power authority to cities, counties, and municipal associations, including responsibility over public safety issues on local streets and roads. And all States have constitutional and statutory provisions addressing and providing for such delegations of the States' police power authority. Neither the Constitution nor federal statutes dictate how the States exercise their reserved police powers, nor should federal law do so.

The Sixth Circuit's reading of the federal statutory phrase "safety regulatory authority of a State" as not permitting the States the discretion to determine how to exercise that authority—including the option of delegating to local government units—runs directly contrary to the longstanding assumption that the States do have precisely such discretion.

This Court has recognized the general rule that a reservation of regulatory authority for the States in a federal statute that might otherwise preempt state regulation "leaves the allocation of regulatory authority to the 'absolute discretion' of States themselves, including the option of leaving local regulation . . . in the hands of local authorities." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 608 (1991).

The States have a substantial interest in the proper resolution of the important and recurring federal question that is presented in the petition. That issue has sharply divided the lower federal and state courts. This Court should grant review.

STATEMENT OF THE CASE

The *amici* States adopt by reference the petitioners' statement of the case.

REASONS FOR GRANTING THE WRIT

I. THERE IS A DEEPENING SPLIT OF AUTHORITY ON THE IMPORTANT AND RECURRING FEDERAL QUESTION RAISED IN THIS CASE.

As amply demonstrated in the petition, there currently are at least four Circuits, including the Sixth Circuit in this case, that have concluded that the States in fact do not have the discretion to delegate the police power reserved to them under 49 U.S.C. § 14501(c)(2)(A). *See Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001); *Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1085 (2001); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 528 U.S. 1038 (1999).

But the Second Circuit and the California Court of Appeals have reached a contrary (and the correct) conclusion, holding that the States do retain such authority. *See Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999), *cert. denied*, 528 U.S. 868 (1999); *People ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870 (Cal. Ct. App.), *review denied* (May 16, 2001).

This deepening split of authority on an important and recurring federal issue that is of great practical significance to the States and local government bodies merits plenary review at this time.

On one side of this issue, the Second Circuit and several state courts have upheld local safety ordinances like the one at issue here. In *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999), the Second Circuit acknowledged that political

subdivisions are not mentioned in the safety exemption (§ 14501(c)(2)(A)).

But the court correctly reasoned that, although "the text of § 14501(c)(2)(A), unlike the other subsections of § 14501, fails to preserve explicitly the regulatory authority of the political subdivision of the state," that is "no reason to construe" the language of § 14501(c)(2)(A) "to prevent the state from delegating *its* regulatory authority to a municipality." *Ace Auto*, 171 F.3d at 775.

In reaching that conclusion, the Second Circuit relied upon the Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 608 (1991), which addressed a similar issue in the context of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). That statute, the Second Circuit noted, expressly permits only "States" to regulate pesticides, but the Court nonetheless held that the most "plausible reading of FIFRA's authorization to the States leaves the *allocation* of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Ace Auto*, 171 F.3d at 775-776 (emphasis added) (quoting *Mortier*, 501 U.S. at 608).

As more fully explained in *Mortier*:

> The principle is well settled that local "'governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them" . . . in [its] absolute discretion.'" * * * The exclusion of political subdivisions cannot be inferred from the express authorization to the "State[s]" *because political subdivisions are components of the very entity the statute empowers*.

501 U.S. at 607-08 (emphasis added) (internal citations omitted).

Because *Mortier* concluded that FIFRA permits the States to delegate authority to political subdivisions even though the relevant federal statute does not expressly mention such local government entities, the Second Circuit reasoned that it is appropriate to read section 14501(c)(2)(A) to permit such a delegation here. *Ace Auto*, 171 F.3d at 775-76.

Like the Second Circuit, the California Court of Appeals has held that section 14501(c) generally does not preempt local tow truck ordinances. "Because safety regulations fall within the traditional police powers of the states, and because Congress has expressly excepted safety regulations from the preemption clause, we cannot curtail the ability of local municipalities to respond to local safety concerns without a clear expression that such was the intent of Congress." *People ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870, 879-80 (Cal. Ct. App.), *review denied* (May 16, 2001).

The Michigan Court of Appeals reached a similar result in *Michigan Trucking Ass'n v. Michigan Public Service Commission*, 571 N.W.2d 734 (Mich. App. 1997), *appeal denied*, 583 N.W.2d 900 (Mich. 1998). In that case, the issue was whether a State could delegate its safety authority to a state agency (the Michigan Public Service Commission) to develop and implement a "motor carrier safety rating system." *Id.* at 735. The court found no preemption because the rules were "promulgated by the PSC pursuant to its authority from the Legislature." *Id.* at 737.

On the other side of the issue, the Sixth Circuit's reasoning is representative of those courts which have held that 49 U.S.C. § 14501(c)(2)(A) does not permit the States the discretion to delegate their reserved police power authority over tow truck operations. In its recent decision in *Petrey* (the case upon which the Sixth Circuit relied in rejecting the City's claim in this case), the court focused on the fact that the general preemption provision (section 14501(c)(1)) applies to "a State, political subdivision of a State, or political authority

of 2 or more States," while the safety exemption (in section 14501(c)(2)(A)) applies just to "the safety regulatory authority of a State."

Relying on the canon of construction that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," *Russello v. United States*, 464 U.S. 16, 23 (1983), the court concluded that the omission of a reference to cities in the safety exemption meant that "while states may regulate the safety of motor carriers, political subdivisions may not." *Petrey*, 246 F.3d at 561.

The Ninth and Eleventh Circuits previously reached the same conclusion. In *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 153 F.3d 538 (11th Cir. 1998), *cert. denied*, 528 U.S. 1038 (1999), tow truck companies objected to several ordinances adopted by Atlanta dealing with "consensual tows"—that is, tows "which occur when the owner of a vehicle expressly requests towing services to be provided by a specific towing company and enters a private contract with the towing company for the services." *Mayer*, 153 F.3d at 541.

Like the Sixth Circuit, the Eleventh Circuit applied the canon of construction that "when Congress omits certain language in a particular subsection of a statute and includes the language in other subsections, the omission is intentional rather than accidental." *Id.* at 545-46. Because only the words "a State" appear in § 14501(c)(2)(A), and not "a State or a political subdivision of a State" as in § 14501(c)(2)(C), the court concluded that this demonstrated congressional "intent that municipal safety and insurance regulations are not exempted from the preemptive scope of § 14501(c)(1)." *Mayer*, 153 F.3d at 545-46.

Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1085 (2001), reached the same conclusion with respect to the tow truck ordinance at issue there, once again relying upon the *Russello* canon of construction.

Most recently, the Fifth Circuit sided with the Sixth, Ninth and Eleventh Circuits. In *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), the court addressed a "chasing" ordinance, much like the City of Columbus ordinance at issue here.

The Fifth Circuit acknowledged "the closeness of the issue and the soundness of the arguments on either side," 260 F.3d, at 440, as well as the division of opinion among the lower courts on this "difficult task of statutory interpretation." *Id.* at 442. Nonetheless, relying on the canon of construction that also persuaded the Sixth, Ninth and Eleventh Circuits, the Fifth Circuit concluded that the absence of a reference to political subdivisions in section 14501(c)(2)(A) demonstrated congressional intent that the safety exemption does not apply to local ordinances.

Ultimately, there is a growing and deepening division of authority in the lower federal and state courts on the issue presented in this case. One Circuit and two state courts have determined that section 14501(c) does not preempt local safety ordinances regulating tow truck operations. Four Circuits have reached the opposite conclusion, and have acknowledged the split of authority on the question.

Moreover, in two states (California and Michigan), the state courts and the federal Circuits that include those states have reached contrary conclusions regarding the preemptive scope of § 14501(c). For these reasons, this case merits the Court's plenary review.

II. THE SIXTH CIRCUIT'S DECISION UNDERMINES THE PREMISE OF STATE CONSTITUTIONAL AND STATUTORY PROVISIONS THAT ASSUME THE STATES HAVE THE POWER TO DELEGATE RESERVED POLICE POWER AUTHORITY IN THE MANNER THEY DEEM MOST APPROPRIATE.

A municipal corporation is a department of the state. For that reason, the state may "fashion its basic law so as to grant home rule or self-government to its municipal corporations." *District of Columbia v. John R. Thompson Co.*, 364 U.S. 100, 108 (1953).

In doing so, the state may give its municipalities as broad authority as the state itself possesses. *District of Columbia*, 364 U.S. at 108 ("the delegated power of municipalities is as broad as the police power of the state, except as may be restricted by terms of the grant or by the state constitution").

Most states have exercised this authority to grant local governments broad authority to regulate municipal affairs, including the adoption of local police power regulations, except where such regulations would conflict with the state's general law. *See, e.g.*, Ala. Code §11-45-1 (1975); Alaska Const. art. X, § 11; Ariz. Const. art. XIII, § 2; Cal. Const. art XI, § 7; Colo. Const. art. XX, § 6; Del. Code. Ann. tit. 22, § 802 (2000); Fla. Const. art. VIII, § 2; Haw. Const. Art. VIII, § 2; Idaho Const. art. XII, § 2; Iowa Const. art. III, § 38A; Kan. Const. art. 12, §5; La. Const. art. 6, § 5; Mass. Const. Ann. Amend. art. II, § 6; Mich. Const. art. VII, § 21; Minn. Stat. § 410.04 (2000); Mo. Const. art. 6, § 19; Mont. Const. art. XI, §6; Neb. Const. art. XI, §§ 2-4; N.J. Stat. § 40:69A-30 (2001); N.M. Const. art. X, § 6; N.Y. Const. art. IX, § 2; N.C. Const. art. VII, §1; Ohio Const. art. XVIII, §3; Okla. Const. art. XVIII, § 3A; Or. Const. art XI, § 2; Pa. Const. art. 9, § 2; R.I. Const. art. XIII, § 2; S.C. Const. art. VIII, § 17; S.D. Const. art. IX, §2; Tenn. Const. art. XI, § 9; Tex. Const. art. XI, § 5; Utah

Const. art. XI, §5; Wash. Const. art. XI, §11; W. Va. Const. art. VI, § 39; Wis. Const. art. XI, § 3; Wyo. Const. art. 13, §1.

It is beyond question that the Constitution generally does not dictate the form or structure of state and local governments, nor the allocation of state power between those entities. *See, e.g., Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1101 (7th Cir. 1995) (recognizing and citing numerous cases for "the principle that the federal Constitution does not prescribe any particular separation of powers, or other internal structure, of state government"); *see also Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself"); *Mayor v. Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental power"). Nor should federal statutes such as section 14501(c) be permitted to do so.

Indeed, in order to fully respect the States' interests in this respect, there should be a strong presumption that any federal statutory reservation of police power authority to a "State" or the "States" includes the discretion for the States to choose to delegate some of that authority to units of local government.

"When Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Thus, only a clear congressional directive can override the presumption in favor of leaving to the States the decision whether and how to delegate reserved police powers. Section 14501(c)(2)(A) is not such a directive.

The consequence of the Sixth Circuit's decision is to force the States to enact safety regulations at the state level rather than allowing localities to pass laws tailored to the unique conditions of their city streets. As a matter of Federal-State comity, as the Court's clear pronouncement in *Mortier* demonstrates, federal courts should be reluctant to discern a congressional intent to undermine this traditional State power.

CONCLUSION

The petition should be granted.

Respectfully submitted,

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
State Solicitor
(*Counsel of Record*)
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612
(785) 296-2215

Counsel for the *Amici* States

[Additional Counsel Listed Below]

November, 2001

BILL LOCKYER
Attorney General
State of California
1300 I Street
Suite 125
P.O. Box 944255
Sacramento, CA 94244

TOM WARNER
Solicitor General
Office of Attorney General
P.L. 01
The Capital
Tallahassee, FL 32399

MIKE MCGRATH
Attorney General of the State
of Montana
215 N. Sanders
P.O. Box 201401
Helena, MO 59620

JERMEY W. (JAY) NIXON
Attorney General of
Missouri
Supreme Court Building
207 W. High Street
Jefferson City, MS 65101

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma
2300 N. Lincoln Blvd.
Suite 112
Oklahoma City, OK 73105

MARK BARNETT
Attorney General
State of South Dakota
500 E. Capital Avenue
Pierre, SD 57501

JOHN CORNYN
Attorney General
State of Texas
P.O. Box 12548
Austin, TX 78711